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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91216725
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Date	05/11/2015
Attachments	Applicant Opposition And Response To Motion To Reopen Discovery.pdf(80968 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 86067598 Published in the Official Gazette April 8, 2014.

ZENITH-MART INC.,

Opposer,

v.

OLETU, GODSWILL H.

Applicant.

Opposition No. 91216725

Mark: ZENITHMART

APPLICANT'S OPPOSITION AND RESPONSE TO ZENITH-MART INC'S MOTION TO REOPEN DISCOVERY

Here comes, the Applicant in opposition to the above Motion filed by the Opposer ("Zenith-Mart Inc") on April 28, 2015.

Background

Applicant have numerous concerns with Opposer's Motion as they are, not concise, vague and not in line with Federal Court Rules and the Board Rules. They do not put the Applicant on fair and proper notice as to what the Opposer's Motion is about. It is the duty of a movant to put the non-movant on clear notice, regarding his/her motion, to enable the non-movant to respond intelligently and on the merit. The Opposer's motion is at best very confusing and did not give the Applicant a fair notice on how to response in good faith and was done clearly to further delay the proceedings.

Here, Opposer is asking to "**Reopen Discovery time**", when discoveries are still open. Further, Opposer is re-litigating the issue of extension of time to comply with the Board's Order of February 6, 2015 to retain a counsel (if he so choose) or represent himself, when the Board in it's Order of March 26, 2015 have resolved and finalize this issue.

Further, Opposer is asking that the proceedings that were resumed by the Board on April 24, 2015; should again be suspended for the third time (all on account of Opposer) for another 180 days; so he can have additional time to comply with the Board's Order of February 6, 2015. This, inspite of the Board's Order, of March 26, 2015 clearly stating that, it will not further extend Opposer's time to comply with it's February 6, 2015 Order to retain an attorney.

Further; it appear that Opposer is attempting to bring a FRCP 12(b)(6) Motion against the Applicant, when the Applicant is in the position of a defendant in this proceeding and Applicant does not have any compliant or Claims before the Board against the Opposer, that can be dismissed by a FRCP 12(b)(6) Motion.

It is very clear that Opposer's main objective is to further delay this proceedings and abuse the TTAB process. Applicant was hoping that, the Board would have stepped-in to address Opposer's latest filings, before his time to response are up.

When a motion is this confusing, any doubt should be resolved in favor of the Applicant, who is the non-movant.

Nothing knowing how best to response, Applicant therefore response in opposition to this motion as followings; and ask that any and all doubts be resolved in favor of the Applicant, as the non-movant:

Arguments

1. Motion to Reopen Discovery

Regarding Opposer's Motion to Reopen Discovery. Based on Board's Order of March 26, 2015; discovery on this proceedings are set to close on June 24, 2015. Applicant therefore ask that, the Opposer's request be denied as moot, since discovery are still open.

To the extent, Opposer is attempting to reopen the time to comply with the Board's February 6, 2015 Order; If Opposer's motion in this regard are proper, he must show excusable neglect and such excusable neglect must take into account all relevant circumstances surrounding Opposer's delay in acting, including (1) The danger of prejudice to the Applicant; (2) The length of the Delay and its potential impact on the judicial proceedings; (3) The Reason for the delay, including whether it was within the reasonable control of the Opposer; and (4) Whether the Opposer acted in good faith, as established by the Supreme Court in *Pioneer Investment Services v. Bruncwick Associates LP* and adopted by the TTAB in *Pumpkin Ltd v. Seed Corps.* The records does not contain any excusable neglect that would satisfy the precedents set above. More so; none of the excuses given by the Opposer are new, they were well known to the Opposer prior to the filing of his March 6, 2015 Motion to Extent time to retain an Attorney; which was granted for forty-six (46) days by the Board. It should also be noted that, Opposer requested for sixty (60) days extension at that time and those sixty (60) days expired on May 8, 2015.

Further; It should be noted that, the Motion to reopen is not proper as the records and Opposer's motion did not set forth in specific teams that, he is now ready to comply with the Board's February 6, 2015 Order, rather Opposer's motion indicates a further request for

additional 180 days extension. This is clearly a miss-use of the Motion to Reopen time and should be denied.

Also; it should be noted that, the issue of complying with the Board's Order of February 6, 2015; has been litigated and finalized by the Board and as contained in the Board's Order of March 26, 2015; Opposer is now representing himself and the proceedings have since resumed. Therefore, Opposer's request to reopen must be denied as moot.

2. Motion to Suspend Proceedings for 180 days

Regarding Opposer's Motion to Suspend proceedings for 180 days to allow him further time to comply with the board order of February 6, 2015. Firstly, the Applicant will like to state that, Opposer's assertions that, his earlier extension was only granted for thirty (30) days is wrong and not supported by the records. Opposer was granted forty-six (46) days; (March 8,2015 to April 23, 2015) to comply with the Board's Order and he failed to do so and even the original sixty (60) days that Opposer sought in his motion are now passed and he has still not complied or ready to comply with that Board Order.

Further, this issue has been litigated, then finalized and closed by the Board's Order of March 26, 2015. In the said Order, the Board allow Opposer "..***until April 23 2015 to file a submission in which either its new attorney enters an appearance or Opposer states that it is representing itself".*** The time to comply with that Order has passed and the Board further Ordered that "...***If Opposer does not comply with this order, the Board will presume that Opposer is representing itself. Proceedings shall resume on April 24, 2015 under the following***

schedule.." There is nothing in the records to suggest that, Opposer complied with the Board's Order and proceedings have since resumed.

Further, the Board's March 26, 2015 Order states "...***Opposer is advised that the Board may be less lenient in granting further extensions in this case"*** and also that "...***In view of Applicant's objection, the Board will not further extend Opposer's time to comply with the February 6, 2015 order. Opposer brought this proceeding and, in doing so, took responsibility for moving this case forward without undue delay"***

Litigants and the general public have come to put their trust and faith on the Board's proceedings and it's Orders, just like in regular Courts and the Applicant is therefore asking that, the Board look to it's own Order of March 26, 2015 and deny the Opposer's request for enlargement of time to comply with it's February 6, 2015 Order.

The Board's Orders should mean what they say and the consequences therein Ordered for actions/inaction(s) should be enforced, continued and reiterated with an Order denying Opposer's new request for extension of time to comply with the Board's Order of February 6, 2015 to retain an attorney or be deemed to be representing himself.

It will be a miscarriage of justice to now grant Opposer's a third consecutive enlargement of time to comply with the Board's February 6, 2015 Order and it will further prejudice the Applicant, as the Applicant just like any other litigant or the general public have, placed faith on the Board's Order of March 26, 2015; as the finality on this issue and have conducted his business and preparations for this case and proceedings with that in mind.

Further, Applicant believe that; Opposer's Motion of April 28, 2015 in this regard, is moot, as the Board, based on the March 26, 2015 Order has presumed that, Opposer is now representing himself, since April 24, 2015.

Applicant, therefore asked that, the Board deny Opposer's latest Motion for an enlargement of time to comply with it's Order of February 6, 2015.

3. Rule 12(b)(b) Motion To Dismiss

The Fed. R. Civ. P. 12(b)(6); permits a responding party to seek a dismissal of a claim, or any part thereof, for failure to state a claim upon which relief can be granted. A motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) requires the Board to decide whether the facts alleged in the complaint entitle the plaintiff to relief. The Board need not accept as true conclusory allegations of law made in the complaint, nor must it accept unreasonable inferences or unwarranted deductions of facts. *Hon. William W. Schwarzer, et al., Federal Civil Procedure Before Trial & 9:221 (2000) (citing In re Delorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993))*. In addition, the Court need not accept as true, conclusory allegations or legal characterizations of counsel. see, *W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).*

In this instant proceeding, the Applicant is in the position of the defendant. The Applicant does not have any Compliant or Counterclaim(s) against the Opposer before the Board that can be dismissed by a Rule 12(b)(6) motion. It should be noted that, both of Opposer's applications that are bases for his Opposition have not been published for Opposition, therefore; the Applicant cannot and did not file any Counterclaim against them.

Further, It does not appear that Opposer is asking for Judgment on the Pleadings here nor is he attempting to strike any of the Applicant's Affirmative defenses. It should be noted that, Applicant have the right to any Affirmative defense(s) he may want to employ, and have put Opposer on notice regarding those defenses.

Applicant lacks enough notice or clarity or specificity from Opposer's as to the intention(s) of this Rule 12(b)(6) motion and Applicant cannot read the mind of the Opposer and as such Applicant is asking that, any doubt or vagueness as to the true intent of this Rule 12(b)(6) motion should be resolved in favor of the Applicant as the non-movant.

Applicant is therefore asking that, Opposer's Fed. R. Civ. P. 12(b)(6) Motion to dismiss should be denied as defective, moot, no cause of action, time barred. Further, the motion fails to state a cognizable legal basis for the relief sought and therefore must be denied.

Applicant, further asked that; the Board should not stop the clock pursuant to FRCP 12(a)(4) as a result of the purported filing of the Opposer's FRCP 12(b)(6) Motion, as Opposer's filing are defective, barred, moot and does not have any cause of action. The only reasonable explanation is that, they were filed to further delay the proceeding and the Board should not reward such filing by stopping the clock.

4. Rule 56 Conversion

Further, since this is not a valid Fed. R. Civ. P. 12(b)(6) Motion; as there is no cause of action or cognizant legal basis for it's filing; Applicant ask that, If the Board found any submitted matters that are outside the Pleadings, that the Board should exclude such submitted matters outside the pleadings for the purposes of the consideration of Opposer's instant Rule 12(6)(6)

Motion. Therefore, the Board should not convert the purported Rule 12(b)(6) motion to a motion under Fed. R. Civ. P. 56.

However, should the Board deem it necessary to convert the Opposer's FRCP 12(b)(6) Motion to a Fed. R. Civ. P. 56 Motion for Summary Judgment. Applicant ask that, as the non-movant and responding party, he be given reasonable and sufficient notice of that conversion and also be given enough time to file a response and present all materials and brief pertinent to the Fed. R. Civ. P. 56 Motion.

5. Attachments to Opposer's Motion

Applicant Object to the various attachments to the Opposer's Motion as they are not admissible as evidence. Applicant will like to preserve his right to further object to them on the merit, should the Board decide to convert Opposer's instant Rule 12(b)(6) Motion to a Rule 56 Motion for Summary Judgment.

6. Hostile Tone and Lack of Decorum in Opposer's Filing

Applicant take exception to the tone, characterization, character assassination, etc with which Opposer address him, in his latest filing. Opposer made many conclusory statements without evidence, called Applicant names, berated Applicant, calling Applicant a liar and in one instance, because Applicant did not response, when the Interlocutory Attorney made a comment about his Answer, during the discovery conference, whereas the Interlocutory Attorney was not actually asking the Applicant a question, but was merely making a comment that does not require a response from the Applicant, more so, this was a hearsay comment from Opposer's former counsel, who did not even reached the conclusion that Opposer reached. This continual behave

flies in the face of the Board's Order of March 26, 2015, which states that: "..***The Board notes the hostile tone of the correspondence between the parties that Applicant submitted as exhibits to its brief in opposition. The parties are reminded that they 'are required to conduct their business [in this case] with decorum and courtesy. Trademark Rule 2.192.".***

Applicant is therefore asking the Board to exert its influence, including sanctions against the Opposer in order to bring Order and decorum to this proceeding.

Prayer

WHEREFORE, Applicant asked that the Board should deny Opposer's latest Motion(s) in their entirety as they are moot, they are defective, they are re-litigating issues already finalized by previous Board Order, they lack cause of action and there are no cognizant legal basis for the relief sought.

Should Rule 56 Conversion became necessary, Applicant asked that the conversion notice date be deemed the date of filing of the Rule 56 Motion, and that Applicant be given adequate time to file a Rule 56 response on the merit.

Dated this 11th day of May, 2015.

Respectfully Submitted,

Signed: __/1gho2kome3/_____
Oletu, Godswill H. (Applicant, pro-se)
/d/b/a Zenithmart
370 W. Pleasantview Avenue, STE#2-120
Hackensack NJ 07601.

CERTIFICATE OF FILING

The undersigned hereby certifies that a copy of this APPLICANT'S OPPOSITION AND RESPONSE TO ZENITH-MART INC'S MOTION TO REOPEN DISCOVERY, was filed electronically through the TTAB's ESTTA system on May 11th, 2015.

Signed: ____/1gho2kome3/_____
Oletu, Godswill H. (Applicant, pro-se.)
/d/b/a Zenithmart
370 W. Pleasantview Avenue, STE#2-120
Hackensack NJ 07601.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of May, 2015; a true copy of the foregoing APPLICANT'S OPPOSITION AND RESPONSE TO ZENITH-MART INC'S MOTION TO REOPEN DISCOVERY, was served upon Opposer by eMail, and addressed to:

1. info@zenithmart.us
2. tmbiam@zenithmart.us
3. trademark@zenithmart.us

Signed: ____/1gho2kome3/_____
Oletu, Godswill H. (Applicant, pro-se.)
/d/b/a Zenithmart
370 W. Pleasantview Avenue, STE#2-120
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